IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 2.3.2007

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.1016 of 1991

1.K.Varadhan
2.D.Sekar ..Defendants/Appellants

-Vs-

Subbarayalu ..Plaintiff/Respondent

The Appeal is filed Under Section 96 of the Civil Procedure Code against the Judgment and decree dated 19.9.1991 made in O.S.No.179 of 1990 on the file of the Subordinate Judge, Cuddalore.

For Appellants : Mr.S.Parthasarathy,
Senior Counsel for Mr.R.Parthiban,
P.Mahadevan and S.Silambanan.

For Respondent : Mr.T.R.Rajaraman

JUDGMENT

This appeal is filed against judgment and decree dated 19.9.1991 in O.S.No.179 of 1990 on the file of the Subordinate Judge, Cuddalore in and by which the learned Sub Judge after analysing the evidence in depth found that the plaintiff is entitled to suit claim and accordingly decreed the suit.

2. For convenience, the parties are referred as arrayed in the original suit.

3. Plaintiff states as follows:-

3.1. The two items set out in the plaint are in survey number 621/0. The total extent in that survey number is 13 acres. First defendant purchased item 1 which is an extent of four acres in the said survey number, and the second defendant purchased an equal extent in the same survey number with specific boundaries on 30.9.1986. On the same day, one Sridhar, son of Perumal Naidu has purchased an extent of one acre in the said survey number and another 2.68 acres in another survey number total lying 3.68 acres.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

All the said deeds were executed on the same day by one and the same owners. The second defendant is the son-in-law of the first defendant. The other party namely Sridhar is the brother-in-law of the first defendant.

3.2. Defendants 1 and 2 represented to the plaintiff that they are agreeable to sell an extent of about 12 acres of land to the plaintiff. They also represented that they along with Sridhar had purchased the said property under three sale deeds and that they are in enjoyment of the same. They offered to sell the property to the plaintiff including the property purchased by Sridhar for Rs.1,50,000/-. The plaintiff was agreeable to purchase the same.

3.3. At the time of the sale transaction, Sridhar was not present and he was away. But defendants 1 and 2 assured the plaintiff that they will be able to convince him to sell the property to the plaintiff. It is agreed that plaintiff should pay an advance of Rs.30,000/- and should pay another Rs.70,000/- on or before 10.9.1989 and the balance at the time of execution and registration of the sale deed. The terms of the agreement was reduced to writing on 31.5.1989. As Sridhar was also expected to join and sign in the agreement, his name also is mentioned as a party entering into a contract in the body of the document.

3.4. As agreed, plaintiff paid an advance of Rs.30,000/- on 31.5.1989 to defendants 1 and 2. The agreement was duly signed by plaintiff and defendants 1 and 2 leaving space for Sridhar to sign. After the execution of the agreement, plaintiff has been telling the defendants to get the signature of Sridhar in token of his consenting to the terms of the agreement. But defendants 1 and 2 were giving some excuse or other and were postponing the same and plaintiff now believes that they were not able to get the signature of Sridhar perhaps Sridhar was not willing to enter into the agreement.

3.5. Any way, plaintiff was agreeable to purchase the property of defendants 1 and 2 which is set out in the plaint. Plaintiff also informed the defendants about his willingness to purchase the suit property after paying Rs.70,000/-. He approached defendants 1 and 2 on more than one occasion before 10.9.1989 with the money and wanted them to receive the money and execute the sale deed in respect of the certain items. It so happened that the second defendant wanted the plaintiff to pay the entire Rs.70,000/- to him. Plaintiff was agreeable to this on one condition that the payment to be made to the second defendant is acknowledged by the first defendant. But the second defendant was not willing for this course. So, plaintiff could not pay the amount to them on or before 10.9.1989.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

3.6. But, plaintiff has always been ready and willing to perform his part of the contract namely to pay the balance amount of Rs.70,000/- and take a conveyance. Even now, he is ready and willing to pay Rs.70,000/- and take the conveyance. Defendants 1 and 2 are bound to sell the property to the plaintiff for Rs.1,00,000/- as the share of Sridhar cannot be sold to the plaintiff. As defendants were evasive and did not co-operate in joining the plaintiff and execute and register the sale deed after receiving the balance price, plaintiff is filing the present suit.

4. Written statement of the first defendant adopted by the second defendant reads as follows:-

4.1. The plaintiff had not filed the suit bonafide. He has not come forward with the entire facts. The suppression of facts is wilful. It is true that S.No.621 totals 13 acres and that the defendants have each purchased 4 acres. Another acre was purchased by Sridhar along with A.C.2.68 in S.No.624/1. When entering in to an agreement, it was specifically agreed that time is the essence of contract. But the plaintiff has not chosen to abide by it. The plaintiff was never ready and willing to perform his part of the contract. The plaintiff never met the defendants with the balance of Rs.70,000/-. If really the money was paid, there was no need for the defendants refuse to receive it.

4.2. In view of plaintiff's failure to comply with the terms of contract, he has to lose the advance amount paid. Because the plaintiff did not have money and does not have money with him, he has filed the suit.

4.3. The plaintiff did not hand over the agreement to the defendants. Hence they could not obtain Sridhar's signature. To the notice issued by the plaintiff, the defendants have issued a suitable reply. The defendants have been put to loss. Hence the suit is liable to be dismissed.

5. Plaintiff was examined as P.W.1. Ex.A.1 to A.3 were marked on the side of the plaintiff to prove his claim. Defendants examined as D.W.1 and D.W.2. Exhibit D.1 was marked on the side of the defendants to disprove the claim of the plaintiff.

6. The lower court after analysing the evidence in depth found that the plaintiff is entitled to suit claim and accordingly decreed the suit.

7. Present appeal is filed by the defendants against such finding.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

8. Heard Mr.S.Parthasarathy, senior counsel for the appellants and Mr.T.R.Rajaraman, learned senior counsel for the respondent.

9. Upon hearing the rival claims the points for determination are:-

1) Whether the plaintiff was ready and willing to perform his part of contract?
2) Whether the properties described in the suit and in the agreement of sale are one and the same?
3) Whether the plaintiff has given up his right for the specific performance of the contract?
4) Whether the finding of the lower court in decreeing the suit is in order?

10. Points 1 to 3:-

Learned counsel for the respondent/plaintiff would contend that the plaintiffs were ready and willing to perform his part of contract and that plaintiff was possessed with sufficient funds to perform his part of contract and that the defendants were postponing the registration of the sale deed and as such, the plaintiff is entitled to suit claim.

11. Learned Senior counsel for the appellants/defendants contend that the plaintiffs were not possessed of sufficient funds to perform their part of contract and that the plaintiff has given up his right of specific performance of contract by sending letter as per Ex.B.1 and that the lower court without looking into the document viz., Ex.B.1 in the right perspective, wrongly decreed the suit in favour of the plaintiff and therefore, the plaintiff was not entitled to suit claim. The suit agreement is marked as Ex.A.1. Suit notice is marked as Ex.A.2. Reply is marked as Ex.A.3. The genuineness of Ex.A.1 was not disputed. Ex.B.1 was filed by the defendants to prove that plaintiff was not possessed of sufficient funds to perform his part of contract. The genuineness of Ex.B.1 was not disputed by the plaintiff.

12. In a case of specific performance of agreement, it is for the agreement holder to prove that he was always ready and willing to perform his part of contract to sustain his equitable relief. Therefore, the recitals in Ex.B.1 is useful to decide this proposition. It reads as follows:-

"தேவரீர் மாமா அவர்களுக்கு சுப்பராயலு எழுதிக் கொண்டது வணக்கம் தாங்களிடம் கூறியப்படி ரங்கநாதபுரம் நிலத்திற்க்கு கொடுத்த பணம் அட்வான்ஸ் ரூ 30.000/= திருப்பி வாங்கிவிடுங்கள் தாங்கள் கூறியபடி நிலத்தை மணிலாபிடிங்கி விட்டேன் நிலத்தை திரு.சேகரிடம் ஒப்படைத்துவிடு மரவள்ளி மகதூல் எனக்கு தேவை இல்லை அவரே மகதூலை எடுத்து கொள்ளட்டும் இஞ்சின் விஜயகுமார் ஏற்றி கொள்கிறேன் என கூறிவிட்டது. அவசியம் எனக்கு பணம் தேவையாக

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

உள்ளது. வேறு நிலம் பேசி உள்ளேன் அதற்கு பணம் கட்ட வேண்டும் திரு.சீனுவிடம் கூறி இப்பணத்தை நீங்கள் கிழமைக்குள் எனக்கு பணம் வந்துசேர ஏற்பாடு செய்யவும் காலம் தாழ்த்த வேண்டாம் அவசியம் இ தை சீனுவிடம் கூறி பணத்தை வாங்கி வரவும் மற்றவை நேரில் (நான் வேறு நிலம் அங்கு பேசி உள்ளேன் ஏ.வி.ஆர் குமார் நிலம் அவருக்கு பணம் கட்டவேண்டும் உடன் பணத்திற்க்கு ஏற்பாடு செய்து அனுப்பவும் மற்றவை நேரில். ஒம். சுப்பராயலு
6.4.90

This document was marked through P.W.1. The genuineness of this document was not disputed. The evidence of P.W.1 reads as follows:-

"பி1. நான் எழுதிய கடிதம் (பி 10) என் மாமா பெயர் முத்து குமாரசாமி ரூ.20,000/= அட்வான்ஸ் கொடுத்ததை திருப்பி வாங்கிக் கொடுக்கும் படி எழுதிய கடிதம் என்றால் சரியல்ல. என் தாய் மாமன் கை மாற்றாக வாங்கி இருந்தார். அவர் இறந்துவிட்டார் வழக்கு சொத்தில் மணிலா போட்டிருந்தார். பி1ல் சொல்லப்பட்ட எவி.ஆர்.குமார் நிலம் தோப்புக் கொல்லையில் உள்ளது. எனக்கு வசதி இல்லை கிரையம் வாங்க தயாராக இல்லை. பி1 கீழ் பிரதிவாதிகளிடம் கொடுத்த பணத்தை திரும்ப கேட்டுள்ளேன் என்றால் சரியல்ல."

In this context, the plaintiff has also elicited certain points with regard to Ex.B.1 through D.W.1. The relevant portion of D.W.1 reads as follows:-

"பி.1 யை முத்துகுமாரசாமி கொடுத்தார். பி1 எனக்கு வந்த லெட்டர் அல்ல. பி1 யை கொடுத்து முத்து குமாரசாமி பணத்தை கேட்டடார். 4வது மாதம் 10, 15 தேதிகளில் 1990 ஆம் வருட்ம பணத்தை கொடுக்கும்படி கேட்டார்.

13. The above recitals in Ex.B.1 and the evidence of P.W.1 and D.W.1 as referred above, would show that the plaintiff has given up his right of equitable relief.

14. As per the agreement under dispute, plaintiff was also not having sufficient funds to perform his part of contract. The specific averments in Ex.B.1 reads that "அவசியம் எனக்கு பணம் தேவையாக உள்ளது." Similarly, P.W.1 has also confirmed this point in his evidence which reads that "எனக்கு வசதியில்லை கிரையம் வாங்க தயாராக இல்லை".

15. Learned counsel for the respondent/plaintiff would contend that the above letter viz., Ex.B.1 does not refer to suit transaction and that the defendants though possessed of the said document not referred the same either in their reply notice or in the written statement, and that the defendants now have set up this defence theory only for the first time and therefore such contention has to be ignored. He has also relied on a decision reported in BONDAR SINGH AND OTHERS VS NIHAL SINGH AND OTHERS (2003 (4) SCC 161) in support of his contention.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

16. Learned Senior counsel for the appellants/defendants contend that the recitals in Ex.B.1 referred to the suit transaction and that the defendants have made a specific pleading in the written statement that the plaintiff was not possessed of sufficient funds to perform his part of contract and that the defendants filed those documents through P.W.1 in support of his defence and therefore the submission of the learned counsel for the respondent/plaintiff has no merit.

17. Learned Senior counsel for the appellants/defendants relied on the following decisions to sustain his claim.
(1) N.P.THIRUGNANAM VS DR.R.JAGAN MOHAN RAO AND OTHERS (AIR 1996 SUPREME COURT 116)
(2)GOPAL DEVI VS KANTA BHATIA (AIR 1994 DELHI 349)

18. I have scanned the principle laid down in the above decisions in detail. In the case on hand, the defendants have specifically stated in the written statement that the plaintiff was not possessed of sufficient funds. His written pleading reads as follows:-

> "The plaintiff did not have money and does not have money with him, he has filed the suit".

19. In support of his written pleadings, the defendants filed Ex.B.1. The genuineness of Ex.B.1 is admitted by P.W.1. The recitals in Ex.B.1 is with reference to suit transaction which can be culled out from the words "ரங்கநாதபுரம் நிலத்திற்க்கு கொடுத்த பணம் அட்வான்ஸ் ரூ 30/000-= திருப்பி வாங்கிவிடுங்கள். The suit property is also related to Ranganathapuram land. So it is proved that the transaction referred in Ex.B.1 is related to suit transaction only. Though P.W.1 made a bald denial at the time of the cross examination that the transaction is not related to suit transaction he has not explained the same at the time of chief examination.

20. In GOPAL DEVI VS KANTA BHATIA (AIR 1994 DELHI 349) the proposition considered in K.S.Sundaramayyar v.K.Jagdeesan, (AIR 1965 Mad 85 (DB) has been dealt with.

> "There was an agreement to sell dated 31 January 1958 respecting certain property in Coimbatore. There was some correspondence between the parties which is not quite relevant for our purpose. On 22 May 1958, however, the plaintiff sent a notice through his advocate to the defendant and the concluding portion of the notice was as under (at page 86)
>
> "As there was no offer even in the telegram to deliver possession to my client of the property as per the terms of agreement, my client was not bound to finish the sale deed as stated in the telegram. You have thus committed default and broken the terms of the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

agreement. My client has been ever ready and willing to act up to the terms to the property by giving the title deeds for my client's inspection and by handing over possession to my client of the portion in your occupation, you are bound to return the sum of Rs.4,000/- received by you as advance and also pay my client Rs.4,000/- by way of damages.

You are therefore hereby called upon to pay my client the sum of Rs.4,000/- received as advance and also Rs.4,000/- by way of damages, within 3 days of receipt of this notice. Take notice that on default of compliance with this demand, steps will be taken through Court for recovery of the said sums."

One of the two counts on which the plaintiff was non-suited by the trial court was that he was not continuously ready and willing to perform the contract and he, therefore, could not obtain relief by way of specific performance. This view was upheld by the Madras High Court and with reference to the concluding portion of the notice reproduced above the court said that such a demand of return of advance paid was quite inconsistent with the subsistence of the contracgt, and it could not, therefore, be said that the plaintiff was ready and willing to perform his part of the contract. The court also noticed subsequent correspondent between the parties and in one of the letters to the defendant the counsel for the plaintiff had said:-

"My client hereby withdraws the notice he gave you for the refund of the advance and the compensation money as he is advised that he can obtain specific performance itself."

21. In the above case, the agreement holder sent a notice to the other party asking to return the advance. The case on hand is similar to that but there is a difference. The plaintiff though not written the letter Ex.B.1 directly to the defendant, but written to the uncle of the defendant. In fact, the plaintiff requested the uncle of the defendant to get the advance amount from the defendant to pay it to him, as he requires the same for purchase of some other land. The plaintiff further expressed that he was in dire need of money.

22. Taking note of the findings rendered above coupled with the facts on hand would reveal that the plaintiff was not possessed of sufficient funds to perform his part of contract which necessitated him to send Ex.B.1 to the uncle of the defendant for

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

getting back the advance amount paid by him as per the agreement which is under dispute. In this context, the decision cited by the learned counsel for the respondent/plaintiff is not agreeable to the facts on hand. Though the genuineness of Ex.B.1 was not disputed by the plaintiff, the lower court has not looked into the document in right perspective resulting in miscarriage of justice. Had the lower court looked into the recitals of Ex.B.1 in detail and scanned the same, as done by me, the lower court would not have granted equitable relief, as the plaintiff given up his right of equitable relief and requested the defendant to return the advance amount.

23. From the narration of the above events it is clear that the finding of the lower court in this regard is not in order. Therefore, the same is liable to be set aside and accordingly set aside.

24. Point No.4:- In view of the findings rendered in Points 1 to 3, I am satisfied that the finding of the lower court in decreeing the suit is not in order. The lower court erred in holding that the plaintiff was ready and willing to perform his part of contract, though as per Ex.B.1, plaintiff was not possessed of sufficient funds to perform his part of contract. Therefore, I hold that plaintiff is not entitled to any relief as prayed for. Hence, this point is answered against the plaintiff.

25. In the result, appeal is allowed. The judgment and decree of the lower court in decreeing the suit in O.S.No.179 of 1990 is set aside. The suit is dismissed. However, the parties have to bear their respective costs.

Nvsri

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

To

The Subordinate Judge, Cuddalore.

+ one cc to Mr. T.R. Rajaraman,Advocate sr no. 13536
+ one cc to Mr. P. Mahadevan, Advocate sr no. 12939

bv(co)
nm(23.03.07)

A.S.No.1016 of 1991

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/